No. 9196

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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BAYLEY & CROSON,
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Attorneys for Appellant.

FILHAM STATIONERY & PRINTING CO., PORTLAND, ORE

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JURISDICTION OF DISTRICT COURT

I—Judicial Code, Sec. 24, and U. S. Code Ann. Title 28, Sec. 41, Sub. 1, is believed to sustain jurisdiction.

II—The basis for jurisdiction of the District Court of the United States for the Western District of ~~Oregon~~ Washington, Northern Division, in this case, rests upon the filing of the complaint in said court in which there is pleaded: (a) Diversity

of citizenship between plaintiff and defendant, Transcript of Record, Page 2, Paragraphs First and Second, plaintiff being an Oregon corporation and defendant being a Washington corporation, and (b) Three causes of action involving a total amount in controversy in excess of $3,000.00, to wit: in the amount of $17,272.17, exclusive of interest and costs. Transcript of Record, Page 4, Paragraph Fifth; Page 5, Paragraph Fourth; Page 8, Paragraph Fourth; Page 8, Prayer of Complaint.

JURISDICTION OF CIRCUIT COURT OF APPEALS

1—Judicial Code, Sec. 128, and U. S. Code Ann. Title 28, Sec. 225, is believed to sustain jurisdiction. It is further believed all appellant jurisdictional requirements have been met by the timely filing of notice of appeal. Transcript of Record, Page 216. Cost Bond on Appeal, TR. Pages 216 and 217, and original transcript of record on appeal properly certified to by the clerk of the trial court.

STATEMENT OF CASE

The principal business of complainant-appellant is the purchase and sale, for export, of lumber and lumber products; an allegation in the complaint to that effect stands admitted. Tr. p. 2, Paragraph First.

The defendant-appellee is the export representative of a large number of Washington mills.

A series of contracts was entered into between the parties, by the terms of which defendant-

appellee, as seller, agreed to sell, and the complainant-appellant, as buyer, agreed to buy, considerable quantities of Pacific Hemlock logs. Copies of these contracts are attached as exhibits to the complaint. Their execution by the parties is admitted. The contracts were drawn by the defendant-appellee.

The first contract, dated September 1, 1936, covered 500,000 feet of logs at $14.25 per M. Cost and Freight to be paid by seller. Shipment October from Grays Harbor/Willapa Harbor, seller's option to Tsingtau, China. This contract was attached to the complaint as Exhibit "A," and was admitted in evidence as complainant's Exhibit 1, Tr. p. 44.

The remainder of the contracts sued upon are practically identical, with the above mentioned complainant's Exhibit 1, with the exception of the dates for shipment, footage and delivery prices. As to dates of shipment, the remaining contracts, with the exception of the last two thereof, all provide for shipment at various times between October and the end of December, 1936. The last two of the contracts, being more particularly pleaded and described in Paragraph Second of complainant's third cause of action, Tr. p. 6 and 7, being Nos. S-4609#3, which called for shipment of 500,000 feet in January, 1937, and S-4609#4, which called for shipment of 500,000 feet in February, 1937.

The seller-appellee only partially performed said contracts, and as a result, complainant was obliged to obtain the balance of logs covered by the contracts in suit, from other persons and at an increased cost to it of $17,272.17, and this action was brought to recover such damage. It is admitted by appellee that, if complainant-appellant is entitled to recover at all, it is entitled to recover the full sum claimed. Tr. p. 55, last paragraph, to and including Tr. p. 56.

The contracts sued upon contained identical "General Conditions" clauses as follows:

> "General Conditions:
>
> "Delivery and/or shipment of material under this contract is subject to acts, requests, or commands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, and the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before enumerated, beyond the seller's control, or for any loss or damage caused by perils usually coveral by insurance or excepted in bills of lading, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes,

if so required by the seler, providled the delay does not exceed thirty days. The conditions of usual charter party and/or bills of lading are hereby accepted by the buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

"Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the accounts and risk of the buyers.

"In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyers' account, if it can be obtained.

"The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

"This contract is to be governed by the laws of the State of Washington, U. S. A., so far as applicable, and otherwise by the laws of the United States of America."

To the appellant's complaint, the defendant-appellee filed an answer, Tr. p. 9, affirmatively setting up the existence of a longshoremen's strike beginning October 28, 1936, and continuing, without interruption, to and including February 5, 1937, and that, by reason of such strike, it was impossible to perform the contracts sued on during the period of shipment agreed upon in said contracts.

To appellee's answer, appellant filed a demurrer, Tr. p. 15 and 16, prior to the effective date of the new rules of civil procedure, contending that the answer failed to set forth facts sufficient to constitute a defense.

Thereafter, an order was entered overruling appellant's demurrer to the affirmative answer, Tr. p. 16 and 17, to which order an exception was taken and allowed, Tr. p. 17.

Complainant-appellant thereupon filed a reply, Tr. p. 17, admitting the strike, but denying impossibility of performance during the period of shipment agreed upon in said contracts, and alleging that performance as to unfilled portions of contracts was possible within 30 days after cessation of the strike.

Complainant further alleged, as a first affirmative reply, that by the terms of the contract, the seller was obliged to ship and perform within a reasonable time after the cessation of the strike, and that it could have completed performance within 30 days, or within a reasonable time after such cessation.

For a second affirmative reply, complainant alleged the existence of a general custom and usage in the lumber and export trade, in the trade area here involved, under which clauses similar to the "General Conditions" clause involved in this

case, are construed to require a seller to ship at the option of the buyer within a reasonable time after the impediment of a strike is removed, and that it was within the power of the seller to have completely fulfilled its contracts within a reasonable time, and within 30 days after the strike ended.

A trial was thereupon had by the court, which resulted in Findings of Fact and Conclusions of Law, Tr. p. 203, to and including p. 213, and a Judgment, Tr. p. 213 and 214, adverse to the complainant. Hence, this appeal.

QUESTIONS INVOLVED

A—The question first presented is, whether or not the appellee-seller is permanently excused from performance under its contracts by the happening of a strike lasting until February 5, 1937, which date is after the date specified in the contracts for shipment. This question is raised both by appellant's demurrer to appellee's separate answer, Tr. p. 15, and the order overruling same, Tr. p. 16, and by the trial court's conclusions of law, Tr. p. 212, paragraphs First, Second and Third, and the Judgment, Tr. p. 213 and 214, and appellant's exceptions thereto, Tr. p. 215 and 216.

B—A further question concerns the limitations imposed upon appellant in its attempt to prove custom and usage of the export trade regarding

shipment and delivery of merchandise contracted for, after the termination of a contemplated impediment to its performance, it being contended by the appellant that, at the time the contracts were made, there existed in the trade such a generally known usage and custom, and that, upon the failure of the contracts in dispute to expressly, or by necessary implication, abrogate such custom and usage, they became necessary adjuncts to a proper interpretation of the contracts.

These questions were raised by the refusal of the District Court to permit evidence of custom and usage to be received; more particularly found in the transcript of record on pages 85 and 86, and at pages 101 to 104, inclusive, and at page 107, and at pages 128 to 131, inclusive, and at pages 140 and 141, and further by Paragraphs First, Second and Third of the Conclusions of Law found by the trial court, Tr. p. 212 and 213, together also, with Paragraphs Twelve and Thirteen of the Findings of Fact, Tr. p. 211, and to the judgment, Tr. p. 213 and 214, to which exceptions were allowed by the court, as more particularly appears at p. 215 and 216 of the Transcript of Record.

SPECIFICATION OF ERRORS

A—The court erred in rejecting or limiting testimony of appellant in support of its contention as to custom and usage, as follows:

SPECIFICATION No. 1

In sustaining an objection by appellee to a question propounded by appellant to the witness, A. S. Penketh, as to what the custom and usage is concerning the construction to be placed upon the clauses contained in contracts between exporters, buyer and seller, for export shipment as to the meaning of, or construction of, a clause relieving the seller from the liability to ship during the period of strike or other like impediment to the shipment, Tr. p. 85 and 86.

Grounds for Objection, Tr. p. 86:

The appellee urged, as grounds for its objection, Tr. p. 86:

> (1) Such evidence was incompetent, irrelevant and immaterial;
>
> (2) That it violated the parole evidence rule;
>
> (3) That the contracts themselves necessarily controlled the rights, unless they were incomplete or doubtful.
>
> (4) That evidence of this character could not be given unless the witness knew what the particular clause in question was between the parties.

The trial court sustained the objection on ground No. 4.

SPECIFICATION No. 2

In sustaining an objection by appellee to a ques-

tion propounded by appellant to the witness, R. J. Darling, as to whether or not there is a general custom relating to the construction of that (strike clauses) or similar clauses in contracts by exporters generally, Tr. p. 101 to 104.

Grounds for Objection, Tr. 101:

The same objections were raised as to Specification No. 1, with these additional:

> (5) The contract provides that it contains the entire engagement between the parties.
>
> (6) The question calls for a statement as to general custom without limiting it to the particular contract in question.

The court sustained the objection on the last above mentioned ground.

SPECIFICATION No. 3

In denying complainant the privilege of making an offer of proof as to what the general custom is as to this clause (strike clauses) or clauses of similar import and tenor, generally used in contracts throughout the trade, and in limiting the proof and privilege of making an offer of proof to the particular provision in the contract in issue, Tr. p. 107.

The offer was denied by the court on its own motion, on the ground that custom as to other or similar contracts would be immaterial.

SPECIFICATION No. 4

In sustaining an objection to the proffered testimony of L. E. Force, to the effect that the entire output of 70 mills in the trade vicinity is marketed under a practically identically worded contract to the ones in issue, concerning which the construction contended for by complainant (that is, that performance be required after the removal of an impediment, such as a strike) is the rule, and in refusing to permit complainant to show this in support of its claimed custom and usage, Tr. p. 128 to the bottom of page 131.

On the court's own motion, complainant's offer of proof here was restricted to custom with regard to the identical contract in issue.

SPECIFICATION No. 5

In sustaining an objection to a question propounded to the witness, Charles E. Dant, by appellant as to whether there is a custom generally in the export trade, that clauses, such as the clauses disclosed by plaintiff's Exhibits 1 and 12, Tr. p. 44, and Tr. p. 121, and providing generally that the deliveries are subject to and conditioned upon no liability against the seller by reason of the acts enumerated in those and similar clauses, where strict performance at the time specified in the contract is prevented or rendered impossible by reason of strike or other enumerated causes, whether there is not, under such contracts, a gen-

eral trade custom and practice, well known and understood throughout the trade generally, not only in the Northwest, but on the Pacific Coast and throughout the world, that such clauses, whatever may be their particular wording, are generally, under the custom, construed to mean that the seller is obligated to deliver within a reasonable time after the removal of the impediment, or the cessation of the strike, if that be the cause, Tr., last paragraph on page 140 to recross-examination, page 141.

To this inquiry, the appellee made "the same objection that I previously made," and the trial court sustained such objection.

B The court erred in making, as its finding of fact:

SPECIFICATION No. 6

The finding No. 12, Tr. p. 211, that the contracts sued upon embodied the complete and final agreement of the parties, and there are no collateral or oral agreements, either antecedent or subsequent, which in any way vary the terms of said written contracts.

SPECIFICATION No. 7

The finding of fact No. 13, Tr. p. 211, that no trade custom or usage exists which is contrary to the provisions of the contracts, or affects the interpretation of any part thereof, or which can be

applied to vary or add to the terms of said written contracts, or which required the defendant to ship or deliver any logs after the time specified in said written contracts for shipment or delivery thereof had expired.

It is contended by appellant that Findings Nos. 12 and 13 under Specifications 6 and 7 are erroneous in that there is undisputed testimony of custom and usage in the record as to the general construction in the trade of the identical "General Conditions" clauses involved in the contracts in issue.

> Testimony, A. S. Penketh, beginning at the last question by Mr. McCurtain on page 87 of the Transcript of Record, to and including the remainder of the witness's direct examination on page 89.
>
> Testimony of R. J. Darling, beginning with the second question by Mr. McCurtain on page 104, Transcript of Record, and continuing through page 106;
>
> Testimony of Charles E. Dant, beginning with the first question by Mr. McCurtain on page 134, Transcript of Record, and continuing through the answer to the second question on page 138.

C The court erred in making as its conclusions of law, Tr. p. 212 and 213:

SPECIFICATION No. 8

The conclusion that the strike permanently excused nonperformance of the contract by appel-

lee, as to all logs which, by the terms of any of said contracts, were to be shipped or delivered during the period while said strike was in effect, Tr. p. 212.

SPECIFICATION No. 9

The conclusion that, upon the cessation of the strike of longshoremen, the appellee was under no obligation to sell, ship, or deliver to appellant any logs which, under the terms of said contracts, were to be shipped or delivered during the months of October, November, and December, 1936, and January, 1937, Tr. p. 212 and 213.

SPECIFICATION No. 10

The finding of fact No. 13 may also be construed as constituting a conclusion of law, to the effect that no trade custom or usage exists which required the defendant to ship or deliver any logs after the time specified in said written contracts for shipment or delivery thereof had expired. It is objectionable as stating an improper conclusion.

SPECIFICATION No. 11

The conclusion that judgment should be entered in favor of the defendant, denying plaintiff relief, Tr. p. 213.

It is contended by appellant that all of the conclusions are erroneous in that the strike is accorded the effect of completely and permanently abrogating the contracts as to all unperformed

portions thereof; whereas, the true rule is that the strike only removed any time essence feature of the contracts which relieved the seller from the liability to buyer for delays occasioned thereby, necessitating complete performance by the seller within a reasonable time after the cessation of the strike. This rule results not only from the correct interpretation of the contracts themselves, but from custom and usage applicable thereto.

SPECIFICATION No. 12

D The court erred in overruling complainant's demurrer to appellee's affirmative answer and defense, Tr. p. 15 and 16.

To this objection, the same contention is advanced by appellee as is advanced to Specifications 8, 9, 10 and 11.

SPECIFICATION No. 13

E The court erred in entering judgment in favor of defendant and against the appellant, Tr. p. 213 and 214.

ARGUMENT

The argument logically divides itself into two main headings, as follows:

A Interpretation and construction ~~of construction~~ of contracts, under which Specifications of Error Nos. 8, 9, 10, 11, 12 and 13 will be discussed.

B Custom and usage, under which Speci-

fications of Error Nos. 1, 2, 3, 4, 5, 6 and 7 will be discussed.

Specifications of Error Nos. 8, 9, 10, 11 and 13 also concern the failure of the court to have given effect to the testimony and rule regarding custom and usage, and these matters will be treated under the above subdivision "B."

A. INTERPRETATION AND CONSTRUCTION

To properly interpret this contract requires, figuratively speaking, as nearly as possible, that we sit in the same chairs, and around the same conference table, with the parties at the time it was drafted.

The buyer and the seller in the instant case had been, for many years, and now are, actively engaged in buying and selling logs and lumber products for export shipment. At the time they made their contract, they knew, or are charged with notice by law, that one contracting to perform an act must perform that act as agreed, or respond in damages for his failure to perform, and so the seller knew that, if it agreed to sell and deliver, freight prepaid, the merchandise herein involved, it was bound to make good its undertaking.

13 C. J. p. 635, Section 706:

> "The general rule is that, where a person by his contract charges himself with an obligation possible to be performed, he must

perform it, unless its performance is rendered impossible by the act of God, by the law, or by the other party, it being the rule that in case the party desires to be excused from performance in the event of contingencies arising, *it is his duty to provide therefor in his contract.*"

(Italics ours.)

Both the seller and the buyer knew that there were certain hazards connected with the export trade. They knew what these hazards were. They had, a short time previous to the execution of these contracts, been through an 82-day strike tie-up of dock facilities on the Pacific Coast. Their vast experience over many preceding years had taught them there were other dangers as well to be considered in contracting their absolute liability to perform.

As a result of this knowledge, the seller had drafted, and prepared for its use, a printed form of contract which, in its judgment, was sufficient to cover all conditions likely to arise, and concerning which it required protection.

It was considered that there might be acts of government impeding performance. There might be acts of God, war, civil commotions, destruction of mill, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or non-arrival at its due date at loading port of a ship, or for any other cause whatsoever, beyond the seller's control.

So they inserted, in their contract, a clause under the heading "General Conditions," which they, in their experience as sellers, deemed necessary for their protection. The seller was responsible for the wording of the provisions adopted, and the buyer, in accepting the contract, of course accepted it subject to the reasonable intendements of the "General Conditions" clause.

Without, for the moment, considering the effect of the particular clauses affording protection to the seller upon the happening of any of these events, it may be well to note that the seller's liability for failure to perform is the full and complete damage suffered by the buyer, including damages for delay, if the contract be interpreted as one in which time is of the essence. That this is such a contract, has been repeatedly urged by the seller.

After arriving at the conclusion that it, the seller, needed protection upon the happening of these or any one of these various events, it must naturally have next asked itself: What measure of protection, or what must be its privilege, when these things happened? One possibility stood out clearly in the seller's mind, and this was the possibility of war. And so it said, "in the event of war affecting this contract, the seller has the right of cancellation * * *." This the seller must have felt was the contingency upon which it required the maximum of protection, that is, the right to cancel the agreement, and it so provided.

It must then have considered delays, of various periods of duration, and for various causes.

It cannot be sensibly contended that the contract is at an end immediately upon the happening of any of the impediments named. To so hold would be to reduce the interpretation to an absurdity, wherein it could be contended that a snowstorm, or fog, holding up the seller's facilities for one hour, even before the last day of a month or two month period set for delivery, would defeat the seller's liability for performance. This is wholly unreasonable. Even the operation of war would not immediately cause the cancellation of a contract, but would only invest the seller *with the right to declare* a cancellation.

It is not the happening of the event causing the impediment itself, but its operative effect in causing a delay, or in causing non-delivery or non-shipment, which affects the contracts.

We know, at this point, that no liability is to be vested upon the seller for the delay of whatever duration it may be, provided only that it be caused by a strike or other enumerated cause and be beyond the seller's control.

If, as has always been contended by the seller, the contract should be construed as being one in which time is of the essence, that element (which in all events would have been for the *buyer's benefit, not* the seller's, and which could be waived by

the buyer) was effectively *removed from the contract* by the express provision thereof *excusing* delays and rendering the seller not liable *for delays*. The very use of the term "not liable for delays" imports the intention of a delayed performance, while excusing failure to perform on a given date.

Black on *Recission and Cancellation,* Vol. I, Section 217:

> "The general rule is that, although the agreement may specify a day for performance or payment, yet, if it is not expressly declared to be of the essence of the contract, or is not consistently so treated by the parties, mere delay or failure to pay or perform on the appointed day, will not be sufficient ground for rescission of the contract * * *. In any event, and on the strictest view of the rights of the parties, where time is not of the essence of a contract, the failure of the contractor to complete the work within the time specified, does not *ipso facto* dissolve or terminate the contract, but, at most, it gives the other party an election to rescind, and the contract continues in force, giving the first party an opportunity to complete his performance of it until the second party exercises his option to rescind, and gives distinct notice of it."

And again, Section 219:

> "Even where time is made the essence of the contract, this provision may be waived by the party for whose benefit or protection it is inserted, either expressly or by extending the time for payment or performance, or by

granting indulgence to the other party in this regard."

If, therefore, time was of the essence in these contracts, which we deny, it was only so in connection with any failure of performance, not caused by any of the enumerated impediments listed in the contract. There would seem to be no reason why the parties could not, in advance, remove a time essence feature upon the happening of certain contingencies. This was the very purpose of the delay clause.

Keeping in mind the absolute liability of the seller to perform, in the absence of contractual immunities, we must next inquire where in the contract is there any provision for relieving the seller from the necessity of ultimate performance? Is it supplied by the terms "non-shipment" and "non-delivery"? These terms are not synonymous with "delay."

The contract provides, "and the seller is not liable for delay or non-shipment or for delay or non-delivery if occasioned by an act of God * * * war * * * strikes * * * beyond the seller's control." What does this clause mean? In very simple language, it means that the seller is not required to do the impossible, and is not liable for failure to do it. It means that it cannot be held liable for *delays* beyond its control, but *that is a far cry from absolute termination of all liability* and *complete absolution from ultimate performance.*

There was a strike, and there were labor disturbances, not, however, in the seller's industry or mill. The strike occurred in an allied industry. It was a strike of longshoremen whose duty perhaps was the loading of the vessel from the dock. We believe it may be seriously contended that there was no impossibility or no delay beyond the seller's control as a result of the strike. If it be said that the existence of the strike caused a break-down of government to such an extent that loading of the vessels could not be done by non-union workmen, then perhaps one might be required to import such impossibility of performance as excusing delay. It is doubtful if the law will consider itself impotent to protect non-union laborers in the performance of the tasks by which they earn their bread and butter. True, a strike made necessary the obtaining of labor for loading through channels more burdensome than if loading were completed by union labor, but here was no impossibility. A greater burden, perhaps, but this has never operated as an excuse for a contractor.

Notwithstanding the foregoing, and admitting, for purposes of this discussion only, that it was impossible to deliver or ship at the express dates, we cannot be permitted to forget that this failure, so far as it related to express dates of shipment, was expressly excused.

Then, let us see if, with the time element feature removed, shipment or delivery was impossible.

Both the buyer and seller were still in business after the strike terminated. Logs were available and carriers and dock facilities were available. There was only a very nominal increase in freight rate of 87½c per M. No facilities were destroyed, nor was there any destruction of the subject matter of the contract.

One seems necessarily forced to the inescapable conclusion that non-shipment and non-delivery were not caused by the strike, and did not result from "any cause beyond seller's control," but were only caused, and only resulted, from the seller's own arbitrary choice—a choice voluntarily made by the seller to escape what, at that time, was a nominal increase in the cost of performance to it—an excuse for a reason which has never been sanctioned by the courts as relieving a seller from the necessity of performance.

13 C. J., page 636, Notes 16 to 45, inclusive:

> "Hence, performance is not excused by a subsequent inability to perform, by unforeseen difficulties, by unusual or unexpected expense, by danger, by inevitable accidents, by the breaking of machinery, by strikes, by sickness, by weather conditions, by financial stringency, or by stagnation of business periods, nor is performance to be excused by the fact that the contract turns out to be hard and improvident, or even foolish, or less profitable, or unexpectedly burdensome * * * the unlawful conduct or interference of a third person."

At this point, it should also be noted, that at no place in the record does it appear the seller could not have obtained carriers at the old rate, had it acted promptly upon the termination of the strike, and this it would have the burden of showing even if it be conceded, which it is not, that the increased cost of performance to it was a legal excuse for its failure to perform. It simply sat on its corporate haunches and hoped it would not get hurt.

In answer to the previous question, we say, most emphatically: "The provision for relieving the seller from the necessity of ultimate performance is not found in the use of the terms "non-shipment" and "non-delivery."

Is it then found elsewhere in the contract? The next provision for which much has been claimed by the seller is, "Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed 30 days."

Expressly, this is nothing more than a provision by which the buyer in advance agrees to waive whatever right it might have to terminate the contract, if the seller should require it to waive it, on account of an impediment creating a delay up to 30 days. We ask the court, where is it an agreement, either expressly or by implication, that the buyer may not further waive, or further extend

the period of 30 days? It is a provision looking toward performance, and not in any sense excusing it, nor looking to complete frustration or cancellation.

The provisions regarding excuses came earlier in the contract. This clause is expressly in limitation of the buyer's privilege to claim a complete frustration of the undertaking because of a delay under 30 days. It is an implied recognition that a situation might occur wherein even 30 days' delay would, so far as the buyer is concerned, completely frustrate the agreement, and entitled it to cancellation. Such a condition might, under certain circumstances, result from a day's delay. In another, it might not result from a year's delay.

There might well have been, in the absence of this provision, such a complete frustration of the undertaking, as to amount to a destruction of the subject matter; where, for example, the parties have contracted in contemplation of the existence of a particular market for the buyer, and a strike of longshoremen imposed a 20-day delay, which cost the buyer this sole market. The buyer may not have been obliged to accept, and the seller would have been left with unsaleable merchandise on its hands. An example of this is treated by the court in the case of

> *Alfred Marks Realty Company vs. Hotel Hermitage Company,* 170 App. Div. 484, 156 N. Y. S. 179.

In that case, the defendant contracted for an advertisement in a program and souvenir of the International Yacht Races, agreeing to pay therefor on publication and delivery of the book, but the races were never held because of war. The court said the defendant was not liable as having failed to guard himself against a viz major, but the mutually contemplated object having failed, the plaintiff could not exact payment.

In the case at bar, such an interpretation or construction, in the absence of the 30-day provision, would have left the seller with merchandise on its hands, for which there was no market, and the buyer free of any obligation to take, and this is the condition the seller wished to guard against by the 30-day clause. Another example is treated in the case of

Mills vs. Stevens, 5 Pa. L. J. 513.

wherein parties made a contract in contemplation of the passage of legislative acts which were essential to the object of the contract. The legislative acts were not passed, and the court held that this defeated the contract, as it completely defeated the object of the parties in making the contract.

The seller, then, looking to its own problems, arising by virtue of the delay, decided it was amply protected by putting into the contract a provision requiring the buyer at its option to take

deliveries up to a 30-day delay, whether such a delay would have amounted to a complete frustration of the undertaking or not. The burden of this was to be on the buyer, not on the seller.

This clause exists in the contract solely in the interests of the seller, expressly covering a period of the first 30 days of delay. It does not purport to cover a period beyond 30 days, and cannot be stretched by implication to do it. It becomes an inoperative provision just as the phrase "restraint of princes" becomes inoperative where the facts do not fit.

Actually, the clause has no bearing upon the present controversy for the additional reason that the buyer is not being charged with a failure or refusal to accept under its requirement. We must again answer, "the provision for relieving the seller from the necessity of ultimate performance is not found in this part of the contract."

There remains only one other place to look for it—the last resort of lawyers, searching for that, of which even the makers of the contract never suspect the existence—the implied provision for cancellation.

13 C. J., Section 521, Notes 26 to 29, inclusive, provide:

> "In order that an unexpressed term may be implied, *the implication must arise from the language employed in the instrument, or be indispensable to effectuate the intention of*

> *the parties.* There can be no implication as against the express terms of the contract, and courts will be careful not to imply a term where the contract is intentionally silent, or which is against the intention of the parties as gathered from the whole instrument. *A term which the parties have not expressed is not to be implied merely because the court thinks it is a reasonable term."*
>
> (Italics ours.)

Since the cancellation provision in event of strike is not expressed in the contract, and the implication of cancellation does not "arise from the language employed," and is positively negatived by the hereinafter treated specific provision providing for cancellation in the event of war, we next inquire, "How is it indispensable to effectuate the intention of the parties?" Not the intention of one of the m, certainly, and, not the intention the court thinks they should have had, but the real thing as gathered from the contract itself.

What is its unquestioned purpose? Sale and shipment of the logs, and nothing else. The parties agree upon time for performance, but in fairness say, this is not to make the seller liable for delays caused by certain things, nor is it to be liable if these certain things absolutely prevent it from performing.

Here are expressed terms that have no need of implications. The same may be said for the 30-day clause. It expresses its own function. It looks

toward performance, not away from it. It should not be tortured into meaning something altogether different than it says. Even the seller didn't find the necessary provision implied from the so-called "30-day clause," *at the time it answered the complaint.* Its ingenious counsel found it only when a demurrer was interposed to an answer which claimed only benefits from the words "non-shipment" and "non-delivery."

Unless the interpretation contended for by appellee is a necessary one, it will not be indulged under this rule, and so, to the proposition of the implied provision, the answer must again be, "the additional provision relieving the seller from the requirement of ultimate performance cannot be found."

Something has been said of frustration, and the agreement of the parties expressly excusing delay. We would say, in passing, that we are not contending that all delays resulting from an excusable impediment, leave the seller bound to perform after th ecause of the delay is removed. We do, however, insist that, before an excused delay can operate to abrogate the contract, it must have existed for an unreasonable period of time. If this were not the rule, all contracts containing strike clauses would be abrogated upon the happening of a strike creating a 5-minute delay, or in case of a contract, worded as ours is worded, after a 5-minute delay caused by fog, or storm. If this were the intention of the seller, why didn't

the contract simply say, "It terminated at the seller's option if any of the enumerated events caused a delay." So much simpler. So much more direct. So much more intelligent and intelligible to the buyer who had no lawyer at its elbow to interpret its meaning.

We may then inquire, was the delay of so unreasonable duration, in the case at bar, as to abrogate the contract? The record is devoid of any correspondence or conversation between the parties during or subsequent to the strike, suggesting that the delay was of unreasonable duration. There was in fact nothing at all on the subject until long after the strike ended, and the buyer was inquiring when shipment would be made, Tr. p. 170.

During the cross-examination of Mr. Herber, general manager of the seller company, after much pressing, the following occurred. Question by Mr. McCurtain:

> "Let me phrase it this way, Mr. Herber. Is it not a fact that on March 18, long after you now say the contract was of no further effect, you declined in your office to commit yourself in writing on the proposition?
>
> "A. I did.
>
> "Q. That is to say, you did refuse to commit yourself?
>
> "A. I refused to commit myself."

Here, then, a month and a half after the strike

ended, at a meeting of the parties held for the purpose of discussing these contracts, the seller failed to suggest any unreasonable delay.

The parties had just experienced a longshoremen's strike two years previous to this one. It is a matter of common knowledge and the subject of judicial notice, that the 1934 longshoremen's strike lasted 82 days. The parties knew this when they contracted to excuse delays caused by strikes, in the present case. Their knowledge that the preceding strike lasted 82 days had a lot to do with interpreting their meaning here.

Is the present delay from the present same cause as in 1934 unreasonable within their contemplation, when the 1934 strike the last one in the shipping industry, lasted nearly as long? As longshoremen's strikes go, according to our recent experience, and among other things, this is what the buyer and seller were excusing, the delay caused by this one was not unreasonable.

The reasonableness or unreasonableness of the delay is nowhere treated in the contract with regard to termination. If the right to terminate exists, it must be found, not under a contract silent on the subject, but under the general law applicable to all contracts, and there are mighty few instances in which the courts have been willing to say, as a matter of law, that there was impossibility of performance such as would justify abrogation of a contract.

Reasonableness or unreasonableness of delay may have to do with the aforementioned doctrine of frustration, where a contract is made upon the mutual assumption that some future event will happen, or some present condition will continue, but it has no bearing in a case such as ours where the object to be accomplished was not, within the mutual contemplation of the parties—a condition precedent to the continuance of any contract, or a condition subsequent, upon the happening of which a contract might be abrogated.

Nor is there any impossibility of performance within the general rules laid down by the courts.

13 C. J., Section 712:

> "Where performance becomes impossible subsequent to the contract, the general rule is that the promissor is not therefore discharged."

To this proposition is cited an abundance of cases from 21 jurisdictions.

13 C. J., Section 715:

> "The general rule is that an absolute undertaking is not discharged by a subsequent act of God rendering performance onerous or even impossible."

The purport of the cases cited under this section is that, to relieve a promissor from the burden of responding in damages for his failure under even an act of God, there must be an element found in, or implied in, the contract.

If the seller would now contend the delay caused by the strike was unreasonably long, was he not under the duty to make such a contention at the first opportunity? How, in good conscience and good law, can a party to a contract which it prepared, and which is wholly imperfect in connection with the seller's contention of a cancellation privilege, be permitted to refuse to commit itself as to whether or not it would perform? We say that the contract, if it implies any privilege for cancellation short of war, it does so in such a doubtful and ambiguous manner as to not permit its draftsman to sit silent in the face of a fair, honest, business demand for interpretation, particularly at a time when the cost of inaction or delay was increasing.

In law, we would call the seller's contention of an unreasonably long delay, or its contention of impossibility of performance, or its contention of abrogation of the contract by the happening of a condition subsequent, an affirmative defense, and require that it be raised promptly. Since an affirmative defense is something the seller might or might not raise, as it chose, and the buyer was helpless before the seller's indecision, ought the seller now to be permitted to say what it didn't or wouldn't say sooner?

When the seller refused to make its decision under the condition of daily increasing rates, we say that it thereby waived the privilege of claiming either that the delay was unreasonable, or that

its imperfect contract gave it cancellation privileges, or that its so-called "30-day" clause meant more than it said.

> "He who fails to speak when conscience bids him speak, the law debars from speaking when conscience bids him remain silent."

The seller is estopped to say the delay was unreasonable, to which it has said in the past, and will probably say again, "Estoppel must be pleaded."

Estoppel never gives rise to a cause of action. It is only a defense to a cause of action, or a bar to a defense. The rule is that it need not be pleaded where there is no opportunity to plead it. The seller's answer did not present the opportunity to plead it in reply. The answer does not put appellant on notice that the seller is hurt by any unreasonable delay, or that the 30-day clause gives it any privileges, or that there is claimed impossibility of performance after the removal of the time element privilege by the strike. It simply says, we are not liable because our contracts say we are not liable, for non-shipment caused by strikes, and on account of the strike, we couldn't ship during the agreed periods. It pleads the strike as an absolute bar by reason of the non-shipment and non-delivery clauses in the contract. And so, within well-recognized rules of law, we are not barred from claiming an estoppel, against contentions not pleaded against us.

The foregoing conclusions and interpretations to be made of the contract at bar do not rest wholly in the logic of the appellant. The following cases are illustrative of the interpretations contended for:

> *Potter vs. Burrell,* The Law Reports, 1 Queen's Bench, 97.

In this case, five ships were due to arrive and load "as nearly as possible a steamer a month," between August and early December. "The dates at which the five vessels were to be due in New Caledonia * * * were mutually agreed between the parties." Two ships were particularly involved: The Strathairly was due September 23. It arrived October 8 or 9. The Strathairn was due October 10. It arrived October 12. The contract provided the charterers should begin to load within 24 hours after arrival. The contract further contained "the usual provisions excepting perils of the sea." All available labor was required to load the Strathairly which was completed October 23. The Strathairn thereupon began loading October 24. The court held that the failure of the Strathairly to arrive on its due date was caused by the perils of the sea, and that the owner, who was the other party to the contract, could recover demurrage from the charterers, and used this very appropriate language regarding delay:

> "It was arranged that the ships should arrive at certain specified dates * * *. Why, then, was the Strathairly late? Not by reason

> of any fault of the owner, but by reason of the perils of the sea. The truth is, she was not late according to the true meaning of the contract. She had arrived in time. As I have pointed out, September 23, the time named for her arrival, was not a fixed date but was an approximate date, and 'as nearly as possible' consistent with the perils of the sea. There was no breach of the contract, nor was there any breach or non-performance of any condition in her being late. She was there as contemplated by the parties to this charater. * * *"

and with the case at bar, we say that the term "not liable for delay" is the equivalent of the term "as nearly as possible consistent with perils of the sea," as used in the *Potter vs. Burrell* case, the delivery dates in our contracts not being inflexible within the true meaning of the contract.

Fish vs. Hamilton, 112 Fed. 742.

In this case, the contract provided for the shipment of certain sheetings. Delivery date was specified as December and January barring fire, strikes and other unavoidable casualties. A strike occurred in the mill where the goods were manufactured beginning in November, and ending in February. The defendant claimed the strike, and his inability to produce the goods during the period, terminated the contract, and refused to make delivery. We quote from the opinion of the Circuit Court of Appeals as follows:

> "The single question is whether the words 'barring fire, strikes and other unavoidable

> casualties' affected the whole contract or merely the time of delivery * * *. If the parties had intended that this provision might void the whole contract, they would naturally have inserted it after the statement of agreement for purchase, or at the bottom of the note. We concur in the opinion of the court below that the provision affects the terms of delivery only, and that the seller was bound to deliver within a reasonable time after the termination of the strike."
>
> *Cotrell vs. Smokeless Fuel Company,* 148 Fed. 594.

The case related to a contract for delivery of coal. The contract contained this clause:

> "Deliveries of coal under this contract are subject to strikes, accidents, interruption of transportation, and other causes beyond the control of the party of the first part, which may delay or prevent shipment."

The court held, in conformity with our contention here, that non-shipment and non-delivery were not beyond the control of the seller, and that the defendant, in the Cottrell case, was only relieved from its obligation to the extent that the happening of the strike rendered it impossible to perform, refusing to apply the reasoning as contended for by appellee in our case, that the privilege of non-shipment was accorded by the delay.

> *Jackson Phosphate Company vs. Caraleigh Phosphate Company,* 213 Fed. 743, C.C.A. Fourth Circuit.

Here was a contract to ship 2,000 tons of phosphate rock at the rate of 200 tons per week unless hindered or delayed by certain impediments. The justice reasoned as follows:

> "Inasmuch as this proviso was inserted and the defendant acquiesced in the same, we are forced to the conclusion that it was the intention of the parties that if the plaintiff was not delayed on account of causes mentioned, that the shipment should be made continuously until the entire amount was shipped, but if, on the other hand, there should be any delay caused by car shortage or bad weather, the plaintiff would be entitled to deliver the rock within a reasonable length of time after the car service had resumed its normal condition * * *. The proviso as to shipments, from the very nature of things, must have been intended to relate to the time of delivery, and we cannot understand the opinion of the theory that it could be construed to relate to the life of the contract."

This case further cites, with approval, the *Cotrell vs. Smokeless Fuel Company* case, *supra,* and *Fish vs. Hamilton, supra,* and see 35 Cyc. 249, as follows:

> "Where the contract provides that deliveries shall be subject to strikes, the existence of a strike merely suspends deliveries during the strike and does not terminate the contract, and the seller is therefore bound to resume deliveries after a reasonable length of time after the strike has ceased."

The court, in the Jackson Phosphate case, continued:

> "Indeed, the rule is so well established that we do not deem it necessary to cite further authorities * * *. As we have stated, under this provision of the contract, the defendant could have required the plaintiff to make the balance of the shipment within a reasonable time. We think that such provision likewise inures to the benefit of the plaintiff and that, therefore, plaintiff was entitled to deliver the rock within a reasonable length of time after the cars were to be had, and that the effort of the defendant to cancel the contract, and its refusal to accept further deliveries under the same, entitles the plaintiff to recover the amount sued for in this action."

Here, then, is a reason stated by the court in a like case, which well illustrates the dangerous position of the buyer in the case at bar, who was unable to get a decision from the seller interpreting its contract.

Acme Manufacturing Company vs. Armenius Chemical Company, 265 Fed. 27.

In this case, the defendant sold 7,000 tons of sulphur pyrites. The contract contained a clause providing that it was made subject to delay or stoppage caused by strikes, accidents, etc., and it also provided that the plaintiff's right to demand pyrites expired January 1, 1917. The price of pyrites increased materially during the latter part of the year 1936, and pyrites were very scarce in 1917. The court quoted from 35 Cyc. 249, *supra,* and concluded by saying:

"This rule, we think, is well established."

Corona Coal Company vs. Hyams, 9 Fed., 2nd Edition, 361.

provided for the sale to plaintiff of 30,000 tons of coal, delivery 3,000 tons monthly. The contract contained a provision that deliveries were subject to delays on account of certain impediments. The court said:

> "We are of the opinion that defendant has not placed itself in the position to rely upon the clause excusing it for conditions beyond its control, because if it had acted in good faith, plaintiff would have received the coal to which it was entitled, not withstanding the strike and car sortage, and also because it was not the intention of the parties that a delay should terminate the contract but only that it should postpone time for delivery."

Street vs. Progresso, 50 Fed. 835.

In this case, there was a charter providing a vessel should proceed with all reasonable speed to Charleston, there to load a cargo of cotton for foreign shipment, and that should the steamer not arrive on or before October 1, the charterer had the option to cancel the contract. The contract contained a clause excepting strikes and other causes beyond the owner's control. A quarantine rendered it impossible for the vessel to dock at Charleston until more than a month after the October 1 date. The court said:

> "No canon of construction is more often resorted to than that the language used by the contracting parties must receive a reasonable construction expressive of the intent of the parties, and tending to promote the object in view * * * the transportation of the cotton was the object to be attained. Whether the transportation commenced October 1 or November 1, was not as material as that the cotton should be transported. This is evidenced by the fact that delay in arriving at the port of lading did not avoid the contract by its terms, but such avoidance for such cause lay solely in the discretion of the charterers."

The court continues:

> "Such delay, unless it be so expressly stipulated in the writing, never defeats a contract unless time be of its very essence, and then generally only at the option of the innocent party. Here it is clear neither party regarded time as of the essence of the contract."

And quoting the language of the District Court from which this appeal was made:

> "So long as the circumstances remained the same, the delay being no longer than might reasonably have been contemplated, the contract remained in force. The month which elapsed made no material change. The respondent was still engaged in carrying merchandise and able to keep her engagements. The libelant still had merchandise to carry."

But, whatever may be said concerning the language heretofore considered, to determine the intention of the parties, there is to be found in the

"General Conditions Clause," language conveniently overlooked by appellee's counsel, and ignored by the trial court, which, when considered in connection with the claim, that the parties intended delay by strike to terminate the contract, clearly negatives such contention.

It has been noted, that in the first paragraph of the "General Conditions Clause," there is enumerated some 18 different reasons for delay, the effect of one of which, a strike, is now claimed caused a cancellation, and among its 18 stated reasons, for delay or non-shipment, delay or non-delivery, is a condition anticipated by the parties, namely, war. If, as appellee's able counsel contends, and the learned District Judge held, the contracts were to be terminated because of, or by reason of, the happening of any one of the enumerated anticipated causes for delay, and by a fair interpretation under the language heretofore considered, why did the seller see fit to insert this additional language in the third paragraph of the "General Conditions Clause"?

> "In the event of *war* affecting this contract, the seller has the *right of cancellation* * * *."
> (Italics ours.)

Disregarding what is believed to be a logical analysis, showing the previously considered language can not be tortured into meaning the seller had the cancellation privileges claimed for it, it is believed the language of this subsequent clause,

definitely prohibits such construction. One does not add water to the already overflowing container. "He who stands on the pinnacle, can only step down." One does not paint the lily. If the seller had a contract which, by fair intendment from language already used, gave it the absolute right of cancellation, because of "Act of God * * * war * * * strike * * *" why add, "in the event of war affecting this contract, the seller has the right of cancellation"?

In logic and reason, the answer is, anti-~~legislation~~-litigation, the seller did not believe the previous provisions of the contract gave it the right of cancellation, and hence, singled out the one cause, and, clearly stated the one condition, under which it desired to reserve to itself, the right to cancel.

> "Nor all your piety, nor all your wit, can cancel out a single line, nor all your tears wash out a word of it."

B. CUSTOM AND USAGE

As was stated in the beginning of the discussion of general interpretation, we must again place ourselves in the position of the parties whose contracts are to be interpreted. It is stated in Volume I of the Restatement of the Law, on Contracts,

> Section 245: "Usage is a habitual or customary practice."
>
> Section 246: "Operative usages have the effect of (a) defining the meaning of the words of the agreement or the meaning of other

manifestations of intention, and (b) adding to the agreement or manifestation of intention provisions in accordance with the usage, and not inconsistent with the agreement or manifestations of intention."

Section 247: "A usage is operative upon parties to a transaction where and only where (c) the usage exists in such transactions and each party knows of the usage or it is generally known by persons under similar circumstances, unless either party knows or has reason to know that the other party has an intention inconsistent with the usage."

"Comment:

"(d) If the parties choose to exclude the application of usage by contracting upon different terms from those customary in the locality or in the occupation to which they belong, they may do so, and it is not necessary, in order to produce this result, that they should state in specific words that the usage is not adopted as part of the contract if they otherwise make their intention manifest."

Section 248: "(2) Where both parties to a transaction are engaged in the same occupation, or belong to the some group of persons, the usages of that occupation or group are operative, unless one of the parties knows, or has reason to know, that the other party has an inconsistent intention."

Section 249: "Usage cannot change a rule of law, but usage may so affect the meaning of a contract that a rule of law which would be applicable in the absence of usage becomes inapplicable."

Kriete vs. Myer, 61 Md. 558.

holding that the time of delivery of goods may be determined by usage.

Brown vs. Hicks, 8 Fed. 155.

This case stands for the rule that the usage is admissible to show that either party to a contract had a right to terminate the contract "for good cause." The corollary in our case would be that usage is admissible to show that neither party had a right to terminate the contract, or that the contract automatically died or lived as the case might be, for a reasonable time after an excusable failure of performance.

17 C. J. 499, Section 63.

> "Evidence of usage is allowed not only to explain but also to add tacitly implied incidents to the contract in addition to those which are actually expressed, and where a contract is not initself a complete expression of the intention of the parties, valid and known usages, if not inconsistent with the expressed terms, are admissible to supply matters as to which the contract is silent. Where a contract is clear and complete, new terms cannot be added by usage. Thus, usage is admissible to determine the proper mode of performance, as for example, to fix the method of weighing or measuring, or the place at which a certain thing is to be done, or the time when or within which an act is to be performed. So, also, it is admissible to show such matters as when the contract was intended to become effective, or how long it was intended to continue in force, or what amount of compensation was due thereunder."

17 C. J. 492.

> "Valid usages concerning the subject matter of a contract of which the parties are chargeable with knowledge, are by implication incorporated therein, unless expressly or impliedly excluded by its terms and are admissible in aid of its interpretation, not as tending in any respect or manner to contradict, add to, take from, or vary the contract, but upon the theory that the usage forms a part of the contract."

It is believed, therefore, that the court was in error in limiting admitted evidence, and in refusing to admit other evidence, of custom and usage not based solely upon the wording of the identical contract in issue. It is urged that the rules permit the application of the doctrine of custom and usage in connection with the present controversy in two respects:

> First: That known usages and customs were in the minds and consciousness of the buyer and seller when the contracts were made, and that they were, therefore, between parties engaged in the same industry, as much a part of the agreement as was any expressed term.
>
> Second: That usage and custom has imported a meaning in the trade to the general effect to be accorded not only the identical language used regarding impediments to performance, but the general language found in other contracts within the industry relating to the some subject matter.

Under the first subdivision, we have a situation

in which both parties are large and prominent operators in the export and lumber industry operating from practically the same base. It is inconceivable that they should not have had or been chargable with, the knowledge of customs and usages in the trade area in which they operated. It is likewise inconceivable that their contracts can be interpreted by the lay mind without bringing into play explanatory usages. It is seriously questioned whether the terminology of their contracts, the hieroglyphics, abbreviations and expressions used therein are wholly intelligible to a man not in the industry. It is like a doctor's prescription—wholly unintelligible to the lay reader. When they use their sign language, they are automatically giving force to the argument, that it is impossible to interpret such contract according to the intention of the parties, without investing it with meanings accorded it in the particular industry involved.

When the court restricted the evidence of custom and usage to that which had grown up under the identical contract in issue, it precluded from its consideration the vast background of the contracting parties, and of the industry in general, only by the aid of which can intelligence be imported into the agreement. The contract at bar was utterly silent as to its requirements and the effect of the parties undertaking, after the termination of an excusable delay. The fair rule would require and permit proof as to what is customarily done in the industry, not under an identically

worded contract, but under a contract identical in principle. By identical in principle, we mean by a contract which excused delays from certain causes.

This would bring us to the next logical step. Under the law, the usage would become a part of the contract unless expressly or by necessary implication excluded. We recall an earlier discussion in this brief on the subject of express or implied cancellation privileges upon the happening of an excused impediment to performance.

No clause is to be found in the contract excluding customs and usages. A careful analysis has failed to disclose anything which might negative the intention of the parties to have their contract interpreted in view of known usages and customs, except the section of the "General Conditions" clause following:

> "The terms of this contract are herein stated in their entirety and it is understood that there is no verbal contract or understanding governing it."

In answer to this proposition, we cite

> 1 *Greenleaf on Evidence,* Section 292, page 374:
>
> "The rule which forbits the admission of parole evidence to contradict or vary a written contract is not infringed by any evidence of known and established usage respecting the subject to which the contract relates."

If these usages are, as we contend, a part of the contract, then they are just as much a part thereof as they would be if typed out and inserted therein. They are not verbal understandings governing it.

Under the second subdivision of the usage and custom subject, a very brief mention of the testimony will be cited. The witness, Mr. Penketh, Tr. p. 85, was asked concerning a general custom to be placed upon clauses contained in contracts between exporters, buyer and seller, for export shipment, whether the meaning or construction of the clause relieved the seller from obligation to ship during a period of strike, or like impediment to the shipment, and on page 86, after having answered that there was a custom, the witness was prevented from testifying by the ruling of the court, on the ground that, necessarily, he could not give any evidence of this character, unless he knew what the particular clause in question was.

This ruling might be proper in a case where the sole purpose of the evidence is to construe certain words, but is wholly improper where the additional function of the testimony is to establish a known and uncontroverted custom and usage present in the minds of the parties at the time the particular clause involved was adopted.

Again, in the testimony of Mr. Darling, Tr. p. 101, Mr. Darling was prevented from answering as to whether there is or is not a general custom for the construction of that or similar clauses in

contracts by exporters generally, and the ground for the restraint imposed by the court was that testimony of general custom, not limited to the particular contract in question, was inadmissible. The court was fully advised of the position of counsel with regard to this contention, repeatedly, by Mr. McCurtain, the colloquy on the subject being found at Tr. p. 102 and 103.

At Tr. p. 107, counsel for appellant made an offer of proof to show the general custom in regard to the particular clause or clauses of similar import as the one involved in the contract at bar, and the court denied the offer. It is believed that in any event, whether the testimony was to be admitted or not, under a proper ruling, the offer of proof should have been permitted. This instance is cited, not in the hope of obtaining a reversal on account of what we now believe may have been an inadvertent ruling of the court, but only to excuse a technical failure to make the offer of proof.

It will be noted, throughout the record, on the subject of custom and usage, that the witnesses have generally answered, notwithstanding the objections, as to what the custom and usage was in the industry in generally, similarly worded contracts, and that the requirements of an offer of proof have been met by these answers, notwithstanding the fact that they have been finally limited or stricken, and the court knew, and the record full well discloses, what the witnesses would

have testified to had they been permitted to answer.

Again, in Mr. Dant's testimony, Tr. p. 133, prior to objection, Mr. Dant testified with regard to the contract in issue and a practically identical contract of the Douglas Fir Company, that there was a general custom and usage in the trade concerning the performance or obligation to perform contracts containing the "General Conditions" clauses. This testimony was subsequently admitted, Tr. p. 135 and 136.

Tr. p. 140, Mr. Dant, re-direct examination, the question was broadened to include an inquiry as to whether there is a custom generally in the export trade that clauses such as the clauses disclosed in plaintiff's exhibits Nos. 1 and 12, and providing that the deliveries are subject to, and conditioned upon, no liability against the seller by reason of the acts enumerated in those and similar clauses where strict performance, at the time specified in the contract, is prevented or rendered impossible by reason of strike or other enumerated causes, whether there is, in such contracts, a general trade custom and practice well known and understood throughout the trade generally, not only in the Northwest, but on the Pacific Coast and throughout the world, that such clauses, whatever may be their particular wording, are generally under the custom, construed to mean that the seller is obliged to deliver within a reasonable time after the removal of the impedi-

ment, or the cessation of the strike, if that be the cause. The court sustained an objection to this question. This is again an instance of an unjustified limitation upon the inquiry.

Notwithstanding the repeated refusal of the court to permit the inquiries as they related to custom and usage, with regard to general clauses of like import, there is present substantial and convincing testimony from witnesses entitled to full credit in this case, limited to the identical contract in issue, and the Douglas Fir contract which is practically identical, that such a custom and usage as is contended for by the appellant exists with regard to the identical contract, and that testimony is undisputed and not met by the testimony of any witness. The best defense made to this contention by the appellee was in the testimony of its general manager, Mr. Herber, who stated, Tr. p. 150, he knew of no such custom "as that which has been suggested here in this court today." Under the rule Mr. Herber is charged with knowledge even though he disclaim it. It is not the privilege of the court to disregard the material, undisputed testimony of reputable business men who submit themselves as sworn witnesses.

CONCLUSION

It is submitted, the appellant has fairly demonstrated, by logic and authority:

First: That the proper interpretation of the contracts in issue required performance by

the seller after the termination, on February 5, 1937, of the longshoremen's strike;

Second: That the proper presentation of its case has been prevented by the rulings of the court limiting it in its presentation of the testimony regarding a controlling usage and custom.

Respectfully submitted,

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